93-86

No. 93-___

Supreme Court, U.S.
FILED
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CLERK

In The

Supreme Court of the United States

October Term, 1993

OREL PARKINS,

Petitioner,

v.

MOBAY CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED[1]

Whether § 136v of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 61 Stat. 163, as amended, 7 U.S.C. §§ 136-136y, preempts state common law tort claims based on inadequate labeling or packaging of pesticides.

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[1] Petitioner, Orel Parkins, appeared as Plaintiff/Appellant below. Respondent, Mobay Corporation, appeared as Defendant/Appellee below. National Agricultural Chemicals Association and Responsible Industry for a Sound Environment appeared as *amicus curiae* in support of respondent.

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OPINION BELOW

The unpublished opinion of the Court of Appeals is cited at 988 F.2d 1218 (11th Cir. 1993) and is reproduced in the petitioner's appendix (Pet.App.) at 1a. The judgment is reproduced at Pet.App. 3a. The decision of the District Court, filed February 11, 1992, is unreported and is reproduced at Pet.App. 5a. The judgment of the district court, entered February 11, 1992, is reproduced at Pet.App. 8a.

JURISDICTION

This Court has jurisdiction on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 61 Stat. 163, as amended, 7 U.S.C. §§ 136-136y, provides in pertinent part as follows:

§ 136v. Authority of States

A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) Uniformity

Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

§ 136(p) Label and labeling. –

(1) Label. – The term "label" means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.

(2) Labeling. – The term "labeling" means all labels and all other written, printed, or graphic matter –

(A) accompanying the pesticide or device at any time; or

(B) to which reference is made on the label or in literature accompanying the pesticide or device, except to current official publications of the Environmental Protection Agency, the United States Departments of Agriculature and Interior, the Department of Health and Human Services, State experiment stations, State agricultural colleges, and other similar Federal or State institutions or agencies authorized by law to conduct research in the field of pesticides.

STATEMENT OF THE CASE

Petitioner, Orel Parkins, individually and as administrator of the estate of Samuel Clyde Parkins, deceased, initiated separate actions in the superior court of Fulton County, Georgia against respondent, Mobay Corporation, manufacturer of the pesticide Di-Syston, seeking damages under Georgia law for wrongful death, conscious pain and suffering, funeral expenses and punitive damages. The actions were removed by respondent, Mobay Corporation, to the district court and, upon motion by petitioner, were consolidated for all purposes.

Plaintiff's decedent, Samuel Clyde Parkins, died after working several weeks for Twitty Pecan Company in Dougherty County, Georgia. For seven to ten days prior to his death on November 4, 1987, petitioner's decedent had worked exclusively in "Field 3 North", harvesting pecans on a pecan shaking machine. As late as August 24, 1987, this field had been sprayed with Di-Syston, a highly toxic pesticide manufactured by respondent, Mobay Corporation. Di-Syston is Mobay Corporation's trade name for disulfaton, an organo-phosphate pesticide compound which causes death by inhibiting the action of cholesterinase, an enzyme controlling the nervous system.

The certificate of death on Samuel Clyde Parkins shows that his death was caused by disulfaton intoxication. A post-mortem examination by the Georgia Bureau of Investigation revealed the presence of toxic levels of disulfaton and demeton-S, a metabolite of disulfaton, in Mr. Parkins' blood.

Although respondent, Mobay Corporation's, Di-Syston label contained certain warnings purportedly designed to acquaint the user with the risks associated with the product's use, the label failed to warn users that Di-Syston exposure may cause human death, failed to warn that the metabolities of Di-Syston are progressively more toxic than the parent compound and failed to warn of risks associated with the decedent's gradual, as opposed to acute, exposure to the pesticide. Moreover, the label implied that safe harvesting of pecans could occur within 30 days of the pesticide's use when, in fact, Mobay Corporation's in-house studies reveal that the product's toxic half-life may be as great as 40 to 100 days.

Without addressing the merits, the district court and the court of appeals dismissed all of the petitioner's claims on the ground that they were preempted by FIFRA. This case presents the same legal questions as are before this Court in *Papas v. Zoecon Corporation*, No. 92-1938, filed June 7, 1993, which was decided by the Eleventh Circuit on March 8, 1993. Indeed, the Court of Appeals' decision expressly cites *Papas* as controlling in the present case.

Given the identity of the two cases, petitioner does not reiterate in full the argument set forth in the petition in *Papas*, but only asks that this Court dispose of this petition in a manner consistent with *Papas*. Thus, if the Court grants certiorari in *Papas*, as we believe it should, the Court should either hold in abeyance this petition pending the disposition of *Papas* or grant certiorari here and consolidate the two cases for plenary review. If certiorari is denied in *Papas*, then it should be denied here as well.

However, as fully described in the *Papas* petition, certiorari should not be denied because there is a deep difference of opinion among the lower courts concerning FIFRA preemption and the Eleventh Circuit's reasoning on this issue is flawed, resulting in the incorrect decision of an important federal question.

CONCLUSION

The petition for a writ of certiorari should be disposed of in a manner consistent with the Court's disposition of the petition in *Papas v. Zoecon Corporation*, No. 92-1938 (filed June 7, 1993).

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-8203

D C. Docket Nos. 1:89-CV-2471 & 1:89-CV-2472

OREL PARKINS, as Administrator of the Estate of Samuel Clyde Parkins, deceased,

Plaintiff-Appellant,

versus

MOBAY CORPORATION, a New Jersey Corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

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(Filed March 9, 1993)

Before FAY and ANDERSON, Circuit Judges, and RONEY, Senior Circuit Judge.

PER CURIAM:

The claims which appellant presented to the district court are all controlled by *Papas v. The Upjohn Company*, 926 F.2d 1019 (11th Cir. 1993). Appellant's "misbranding" claim was not presented to the district court, but rather

was raised for the first time in its supplemental brief on appeal. We decline to entertain that claim.

The judgment of the district court is

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 92-8203

D C. Docket Nos. 1:89-CV-2471 and
1:89-CV-2472

OREL PARKINS, as Administrator of the Estate of Samuel Clyde Parkins, deceased,

Plaintiff-Appellant,

versus

MOBAY CORPORATION, a New Jersey Corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

---

(Filed March 9, 1993)

Before FAY and ANDERSON, Circuit Judges, and RONEY, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that the plaintiff-appellant pay defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

Entered: March 9, 1993
For the Court: Miguel J. Cortez, Clerk

By: /s/ Karleen Illegible
Deputy Clerk

ISSUED AS MANDATE: APR. 09, 1993

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

OREL PARKINS, as Administrator of the Estate of SAMUEL CLYDE PARKINS, deceased,	:	CIVIL ACTION
Plaintiff,	:	1:89-cv-2471-MHS
v.	:	
MOBAY CORPORATION, a New Jersey Corporation,	:	
Defendant	:	
OREL PARKINS, as next of kin of SAMUEL CLYDE PARKINS, deceased,	:	CIVIL ACTION
Plaintiff,	:	1:89-cv-2472-MHS
v.	:	
MOBAY CORPORATION, a New Jersey Corporation,	:	
Defendant	:	

ORDER

(Filed Feb. 11, 1992)

This matter is before the Court on defendant's motion for summary judgment. For the reasons stated briefly below, the Court will grant the motion.

In his capacity as next of kin and administrator of the estate of Samuel Clyde Parkins ("parkins"), plaintiff Orel

Parkins filed two separate actions in the Superior Court of Fulton County against defendant Mobay Corporation, manufacturer of the insecticide Di-Syston. The actions were removed to this Court and consolidated for all purposes. The Amended Complaint alleges that Parkins, while working for Twitty Pecan Company, was exposed to Di-Syston and died as a result of this exposure. The Amended Complaint further alleges that the labeling of Di-Syston was inadequate because it failed to warn of the dangers associated with the use of Di-Syston. The Amended Complaint sounds in negligence (Count I) and strict liability (Count II).[1]

Defendant argues that plaintiff's claims are pre-empted by the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y ("FIFRA"), under which Di-Syston is registered with the Environmental Protection Agency. Defendant cites *Papas v. Upjohn Co.*, 926 F.2d 1019 (11th Cir. 1991), in support of this position. In *Papas*, after noting that "[u]nder FIFRA, the federal government – through the EPA – has the sole and exclusive right to regulate pesticide labels," *id.* at 1024, the Court of Appeals held that "FIFRA impliedly pre-empts state common law tort suits against manufacturers of EPA-registered pesticides *to the extent that* such actions are based on claims of inadequate labeling." *Id.* at 1026 (emphasis in original). Plainly, as defendant contends, *Papas* forecloses

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[1] Defendant's motion for summary judgment was filed before the original complaint was amended – that is, before Count II was added. However, since, as noted above, both Counts I and II attack the adequacy of the labeling, defendant's motion is, in fact, directed at both counts and will be so considered by the Court.

recovery based on the claims asserted by plaintiff. Plaintiff argues, however, that *Papas* was effectively overruled by the Supreme Court in *Wisconsin Public Intervenor v. Mortier,* 111 S.Ct. 2476 (1991). The Court disagrees. In *Mortier,* the Supreme Court merely held that FIFRA does not pre-empt regulation of the use of pesticides by local governments. The question decided by the Court of Appeals in *Papas* was not presented to or considered by the Supreme Court in *Mortier.*

Accordingly, the Court GRANTS defendant's motion for summary judgment [#19] and DENIES AS MOOT defendant's request for oral argument [#32]. The Court DIRECTS the Clerk to enter judgment in favor of defendant.

IT IS SO ORDERED, this 7th day of February, 1992.

/s/ M. H. Shoob
Marvin H. Shoob,
Senior Judge
United States District Court
Northern District of Georgia

ENTERED ON DOCKET
FEB 11 1992

L.D.T., CLERK

BY:
DEPUTY CLERK

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Orel Parkins,	:	CIVIL ACTION NOS.
Plaintiff,	:	1:89-CV-2471-MHS
vs.	:	1:89-CV-2472-MHS
Mobay Corporation,	:	
Defendant.	:	

JUDGMENT

This action having come before the court for consideration of defendant's motion for summary judgment, and the court having granted same, it is

Ordered and adjudged that the plaintiff, Orel Parkins, take nothing, that the action be dismissed, and that the defendant, Mobay Corporation, recover from the plaintiff the costs of this action.

Dated at Atlanta, Georgia, this 11th day of February, 1992.

Luther D. Thomas, Clerk

By: /s/ Jack C. Barrs
Jack C. Barrs
Deputy Clerk

Prepared, Filed and Entered
in the Clerk's Office
February 11, 1992
Luther D. Thomas, Clerk

By: /s/ Jack C. Barrs
Jack C. Barrs
Deputy Clerk